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Memorandum

TO: Donald T. Witherill
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FROM: Amy B. Mills, AAG 

DATE: October 17, 2008

SUBJECT: Lake Water Quality Report; constitutional issues

INTRODUCTION

Section 3 of P.L. chapter 593 (123rd Legislature), An Act to Protect Lake Water Quality ("the Act"), directs DEP to submit to the Legislature a report regarding means to diminish impacts on lake water quality. Section 3 further directs DEP to consult with this Office regarding "an analysis of the constitutional issues regarding the public purpose doctrine raised by permitting a municipality to adopt an ordinance that includes an assessment of an annual fee on property owners for construction or maintenance of a private road to prevent degradation of water quality." This memo responds to your request for such consultation regarding the public purpose doctrine.

It is important to note at the outset that this analysis is based upon a general description of the contemplated legislation as described in the Act. Once legislation is drafted, it should be reviewed for consistency with the applicable constitutional requirements discussed here. I would be happy to provide further advice at that stage of the process, should that be helpful.

The Law Court has not addressed the specific issue raised by the Act. However, for the reasons discussed below, we believe that legislation designed to prevent water quality degradation can be drafted in a manner that would likely pass constitutional muster with respect to the public purpose doctrine. Any legislation that imposes an assessment on property owners is also subject to certain constitutional limitations on the assessment of taxes. Because of their importance, I have also provided a brief outline of these requirements.

LEGAL ANALYSIS

A. The Public Purpose Doctrine

1. Cases Discussing the Constitutional Standard

The Law Court has recognized that the concept of public purpose is not static, *see Common Cause v. State of Maine*, 455 A.2d 1, 24 (Me. 1983) discussed *infra*, but it has not applied the doctrine in the specific context contemplated in the Act, namely with respect to water quality. While it may seem obvious that preventing water quality degradation serves a public purpose, the more difficult issues are how to structure the tax and how to structure a program to prevent water quality degradation, *see discussion infra*. Before specifically addressing the issues raised regarding private roads and water quality, I will address the basic parameters of the public purpose doctrine.

The public purpose doctrine is based on the following language in art. IV, pt. 3, § 1 of the Maine Constitution:

The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.

The Law Court has interpreted this provision to require that taxation at either the state or local level be for a public purpose, *Delogu v. State*, 1998 ME 246 ¶ 10, and has stated that it is well-settled that “[t]he expenditure of public fund funds must be for a public purpose,” *Common Cause*, 455 A.2d at 43. This section of the Constitution, however, also constitutes “broad legislative power [and] gives rise to an initial presumption that any statute enacted for the purpose of spending tax revenues is constitutional, and the court will invalidate a statute only in those cases where the Legislature has *clearly* exceeded its constitutional authority by expending tax revenues for other than a ‘public purpose.’” *In re Questions Propounded by the Senate*, 601 A.2d 610, 619 (Me. 1991) (emphasis in original); *see also Common Cause*, 455 A.2d at 52.

Thus, legislative findings that an expenditure will serve a public purpose “are entitled to great weight, [but] the question of public purpose is ultimately a matter for determination by the courts.” *Common Cause*, 455 A.2d at 45-46. With respect to that judicial determination, “it is not for the Court to assess [a project’s] wisdom or efficacy as a matter of economic or fiscal policy.” *Id.* at 49. Rather, if there is a rational basis for the Legislature to conclude that the project will achieve the intended public benefits—that is, if the project is a reasonable means for achieving the stated public purpose—then the project will not be struck down. *Id.*

The Law Court has also addressed the public funding of private interests, holding that a subsidy of public funds to a private person may serve a public purpose where the funded project benefits the public directly (clearance of urban blight), produces a product that the public will have a right to use (rail road transportation), or where a project has the indirect public benefit of promoting the general economic climate (stimulating the economy and creating jobs). *See Common Cause*, 455 A.2d at 58-76 (discussing cases upholding public purpose). “Ultimately, in

examining the constitutionality of a tax or spending measure, the Court should focus on whether the plan threatens a detriment to the public which outweighs the benefit that could have been anticipated.” *Id.* at 75. In that regard, the Law Court has noted “[t]hat some private interests would be benefited by [a] project [does] not prevent the basic purpose from being public in nature.” *Id.* at 66 (discussing cases upholding projects aimed at eliminating urban blight, subsequent sale or lease of cleared area for private purposes notwithstanding).

Finally, the Law Court has addressed the public purpose doctrine in the context of spending public funds on the maintenance of private roads. In *Opinion of the Justices*, 560 A.2d 552 (Me. 1989), the justices were asked to respond to questions regarding legislation with the stated purpose of “protect[ing] the health and safety of the members of the public who reside along the privately owned roads by ensuring adequate access and egress for police, fire and other emergency vehicles, as well as other vehicles traveling to and from those residences.” *Id.* at 553. The justices’ conclusion that a public expenditure upon private roads did not serve a public purpose turned on the fact that the public had no legal right to travel the roads and thus could be barred from using them. The justices, however, narrowed their opinion by stating that the legislation did not give rise to an “occasion to comment on the validity of a general statute addressing the maintenance of access to private property for the use of emergency vehicles,” *id.* at 555, such vehicles enjoying a greater right of access across private roads than the public at large.

2. Application of the Case Law to Lake Water Quality Initiative

The Law Court precedent discussed above regarding the public purpose doctrine may provide guidance to DEP as it considers the use of public dollars to improve private roads for the purpose of preventing the degradation of lake water quality. Specifically, (1) the purpose of the contemplated legislation must be a public purpose, and (2) there must be a rational basis to conclude the action or project authorized by the legislation will indeed serve that public purpose.

With respect to the first factor, the stated purpose of the proposed assessment to fund road improvements is to prevent degradation of water quality. Unless clearly demonstrated otherwise, such legislation would be entitled to a presumption of constitutionality. A legislative finding concluding that protecting water quality benefits the public would be consistent with prior legislative findings recognizing the importance of protecting water to promote the health, safety and general welfare of the public, *see, eg.* 38 M.R.S. §§ 410-L (lake protection), 435 (shoreland zoning), 464 (water classification program), 480-A (natural resources protection).¹

¹ There appear to have been few legal challenges to findings that protecting water quality serves the public’s interest as a general matter. The Law Court has noted, in the context of an eminent domain proceeding, that “[t]o protect the purity and conserve the quantity of a public water supply is undoubtedly a public purpose.” *Bowden v. York Shore Water Company*, 95 A. 779, 156 (Me. 1915). Where the issue has arisen in the context of restrictions on development, *see, e.g., Manzo v. Marlboro*, 838 A.2d 534, 540-41 (N.J. Super. 2003) (protecting streams worthy land use purpose), *Massachusetts v. Blair*, 2000 Mass. Super. LEXIS 172, 19-20 (protecting drinking water supplies and wetlands legitimate state interest), *Christianson v. Snohomish Health District*, 946 P.2d 768, 775 (Wa. Sup. Ct. 1997) (protecting public health, surface and ground water legitimate public purpose), *Sun Ridge Development, Inc. v. Cheyenne*, 787 P.2d 583, 589 (Sup. Ct. Wyo. 1990) (drainage regulations proper exercise of police powers), case law suggests legal disputes have turned less on whether protecting water quality is a legitimate purpose and more on

Such a purpose appears to be distinguishable from the purpose considered in the 1989 *Opinion of the Justices* regarding improvements to private roads to improve access because the instant legislation does not turn on public use or access along privately-owned roads, but rather is directed more broadly at protecting water quality.

The second and more difficult consideration with respect to the public purpose doctrine is whether there is a rational basis to conclude that improving roads will protect water quality. There is a spectrum of possibilities here because arguably not all improvements may have the desired water quality impact, not all roads are a factor in water quality degradation, and not all waters are similarly situated. DEP, of course, has expertise to bring to bear in this area. For example, the legislation could authorize only improvements designed to satisfy best management and design standards that result in decreased surface water runoff and only with respect to roads identified as contributors to lake water quality degradation. While it is likely that any improvement will also bestow some private benefit, that land owners along the private roads would be benefited would not necessarily prevent the basic purpose from being public in nature.²

B. Constitutional Restrictions on Taxes and Assessments

The language of the Act contemplates the assessment of a fee on property owners for construction or maintenance of a private road in order to prevent water quality degradation. There are several constitutional requirements that might apply to the imposition of a tax or assessment.

A funding mechanism must be consistent with Article IX, Section 8 of the Maine Constitution (mandating equal apportionment and assessment of taxes) and Article IX, Section 9 of the Maine Constitution (mandating nondelegation of legislative power to tax). *See Delogu v. City of Portland*, 2004 ME 18 (2004). Further, it is not clear whether the contemplated legislation would authorize a special assessment. With respect to special assessments (that is, a charge upon real property within a pre-determined district to defray the expense of a public improvement), there must be both a public purpose and a special benefit to the properties assessed above that accruing to the public. *See McBreaity v. Commissioner*, 663 A.2d 50 (1995); *City of Auburn v. Paul*, 24 A. 817 (Me. 1892). The special “assessment must be rationally related to the objective for which it is imposed, and must be in proportion to the benefit conferred.” *Concerned Taxpayers Coalition of Scarborough v. Town of Scarborough*, 576 A.2d 1368, 1370 (1990).³

whether the means chosen serve the stated purpose. *See* discussion in text *infra* regarding rational basis review and DEP expertise.

² In other words, it appears prudent to consider whether, and if so to what extent, the private benefits remain incidental to the protection of water quality for the benefit of the public at large.

³ Finally, while not a constitutional limitation on the assessment of taxes, it is assumed the contemplated legislation would authorize a program whereby private property owners would voluntarily provide access to their property for the road improvements, thus eliminating other constitutional issues such as due process and takings. *See Haley v. Davenport*, 168 A. 102, 103 (Me. 1933) (statute authorizing the draining of another’s private property for access unconstitutional); *Paine v. Savage*, 136 A. 664 (Me. 1927) (statute authorizing the use of private roads for another’s logging purposes unconstitutional).

I hope that this memo will be of assistance to DEP as it prepares the report required by the Act. While DEP has considerable expertise with respect to developing means to diminish impacts on lake water quality, it may be advisable for DEP to consult with Maine Revenue Services with respect to devising a constitutionally sound tax assessment structure. If I can be of further assistance, please do not hesitate to contact me.